

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant met with personal injury by accident on July 13, 1993, when a lid from a large trash dumpster fell down striking claimant across her neck and shoulders. Claimant continued working through November 17, 1993, but her condition progressively worsened. She began receiving medical treatment for her right shoulder on July 14, 1993, with Drs. Lygrisse, Toohey, and Murphy. Dr. Murphy referred claimant to Dr. Paul Stein, a neurosurgeon. Claimant was also examined by Dr. Robert Eyster and Dr. Robert A. Rawcliffe, board-certified orthopaedic surgeons.

Dr. Stein found that claimant's cervical degenerative disc disease was a preexisting condition but felt that the dumpster incident permanently aggravated this preexisting condition. He assessed a 4 percent whole body functional impairment to claimant's neck. Dr. Rawcliffe felt that claimant's preexisting neck condition was only temporarily aggravated. He did believe that claimant's right shoulder was permanently aggravated by the injury. He assessed claimant a 5 percent whole body functional impairment to the right shoulder. He opined claimant had a total whole body impairment of 10-12 percent for the left shoulder and the neck. His restrictions to claimant applied both to the right and left shoulders and to the neck. He advised claimant lift no greater than 15-20 pounds above the elbow, no lifting away from the body, no lifting above mid-chest, occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

Dr. Robert Eyster examined claimant and assessed a 6 percent impairment to the right shoulder with restrictions of 30 pounds pushing and pulling with the right arm and no repetitive overhead work. He further advised she should do no more than 6-10 times of overhead reaching per hour.

Claimant was examined at the request of her attorney by Dr. Ernest R. Schlachter, a general practitioner. Dr. Schlachter assessed claimant a 5 percent permanent partial disability to the body as a whole for her neck injury, a 27 percent permanent partial disability to the right upper extremity for the right shoulder and a 14 percent permanent partial disability to the left upper extremity for the left shoulder all of which he combined in assessing claimant a 29 percent whole body functional impairment.

Respondent disputes whether claimant's left shoulder was injured or whether her injury was limited to the right shoulder. Dr. Schlachter assesses claimant a functional impairment to the left shoulder and finds it to be part of the original injury. Dr. Rawcliffe found claimant had symptoms to the left shoulder and assessed a functional impairment to that extremity as well. The Appeals Board finds, based upon a preponderance of the credible evidence that claimant suffered injury to both shoulders and her neck.

In assessing claimant's functional impairment, the Appeals Board finds the opinions of Dr. Schlachter and of Dr. Rawcliffe should be considered. The functional impairment

assessed by Dr. Stein to claimant's neck is practically identical to the opinions of both Dr. Rawcliffe and Dr. Schlachter and therefore will be given equal weight with regard to the neck injury. In assessing the medical evidence the Appeals Board finds claimant has suffered a 20 percent permanent partial functional impairment to the body as a whole for the injury suffered on July 13, 1993. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board must next consider whether claimant is entitled to a work disability. The Administrative Law Judge assessed claimant a 64.5 percent permanent partial work disability as a result of the injury suffered. Claimant continued working for respondent through November 17, 1993, earning comparable wages. Therefore claimant would be limited to a functional impairment for that period of time. As of November 17, 1993, claimant's employment with respondent ended when the respondent eliminated her job.

Subsequent to her termination of employment claimant was placed in contact with Karen Terrill in order to receive job placement assistance. Ms. Terrill arranged for multiple employment contacts for claimant. Of the 43 possible contacts, claimant contacted 26 by telephone and interviewed only 4 in person. Ms. Terrill testified that these jobs were within claimant's limitations. Ms. Terrill testified that on more than one occasion claimant misrepresented her restrictions to the job interviewees. She also advised potential employers that she did not have a car available to get to her job even though she was capable of getting to her ornamental design class and was always at Karen Terrill's office at the scheduled time without difficulty. Ms. Terrill felt that claimant tried to avoid reasonable job placement and gainful employment. Since last being assisted by Karen Terrill, claimant has applied for only one position, that being a management job at an apartment complex. As of the regular hearing in August 1996, claimant remained unemployed.

The Kansas Court of Appeals in Copeland v. Johnson Group, Inc. and Travelers Insurance Company, 24 Kan. App. 2d 306, \_\_\_ P.2d \_\_\_ (1997) was asked to consider work disability under the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Copeland, in attempting to harmonize the new language of K.S.A. 44-510e(a) with the principles found in Foulk, the Court of Appeals held that the fact finder must make a finding of whether a claimant has made a good faith effort to find appropriate employment. If a good faith effort has not been made by the claimant, then the fact finder must determine an appropriate post-injury wage, based upon all the evidence before it, including testimony concerning the capacity to earn wages.

In this instance claimant has not shown a good faith effort to return to employment at a comparable wage. Her cooperation with Karen Terrill was less than satisfactory and her attempts to obtain employment since her last contact with Karen Terrill have been

practically nonexistent. As such the Appeals Board finds, in considering the principles set forth in Copeland, the claimant has failed show a good faith effort to obtain employment.

Considering the opinion of Karen Terrill, the Appeals Board finds claimant had the ability to earn at least 95 percent of the wages she was earning with respondent. In applying the principles of Copeland and the principles of Foulk the Appeals Board finds claimant purposely avoided employment which would have allowed her to earn at least 90 percent of the wages being earned at the time of her injury. As such the Appeals Board finds claimant is limited to her functional impairment of 20 percent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated April 28, 1997, should be, and is hereby, modified and the claimant, Linda K. Jones, is granted an award against respondent, American Red Cross, and its insurance carrier, National Union Fire Insurance Company, for an injury suffered on July 13, 1993, for a 20% permanent partial functional disability to the body as a whole.

Claimant is awarded 30 weeks temporary total disability compensation at the rate of \$253.24 per week in the amount of \$7,597.20 followed by 80 weeks permanent partial disability compensation at the rate of \$253.24 per week in the amount of \$20,259.20 for a total award of \$27,856.40 all of which is due and owing in one lump sum minus amounts previously paid as of the time of this award.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's contract for attorneys fees are approved insofar as they are not in contravention to K.S.A. 44-536, as amended.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services	
Transcript of Regular Hearing	\$255.50
Court Reporting Service	
Deposition of Karen Crist Terrill	\$163.60
Deposition of Robert Eyster, M.D.	125.70

Deposition of Robert Rawcliffe, M.D.	188.40
Bannon & Associates	
Deposition of Jerry D. Hardin	\$371.90
Deposition of Ernest Schlachter, M.D.	231.50
Deposition of Paul Stein, M.D.	114.50

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Jeffery R. Brewer, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director